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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 511

THE NEW NEGRO ALLIANCE, A CORPORATION, ET AL.,
Petitioners,

v.

SANITARY GROCERY COMPANY, INC., A CORPORATION,
Respondent

BRIEF FOR RESPONDENT SANITARY GROCERY COMPANY, INC., OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Statement of Case

The Petitioners seek a review of a decision of the United States Court of Appeals for the District of Columbia affirming a final order and decree of the District Court of the United States for the District of Columbia (then the Supreme Court of the District of Columbia) permanently enjoining the New Negro Alliance, a corporation, and two of its officers, William H. Hastie and Harry A. Honesty, from picketing or boycotting retail grocery stores of the Respondent, Sanitary Grocery Company, Inc. The case was finally disposed of on bill and answer in the trial court.

Respondent, Sanitary Grocery Company, Inc., is a corporation operating a large number of retail grocery stores in the District of Columbia. The Petitioner, New Negro Alliance, is a corporation composed of colored persons, its purpose, as stated in its Certificate of Incorporation filed with the Recorder of Deeds of the District of Columbia, on, to wit, November 18, 1933, being for *the mutual improvement of its members and the promotion of civic, educational, benevolent and charitable enterprises* (Record, pp. 3, 15). The other Petitioners are the Administrator and Deputy Administrator of the Petitioner Corporation.

The sole question involved in Petitioners' application for a review of the unanimous decision of the United States Court of Appeals for the District of Columbia (Mr. Justice Stephens dissenting in part, but concurring in the result) is whether Petitioners, *who admit that the relation of employer and employee does not exist between them and the Respondent and that they are not engaged in any competitive business with the Respondent* (Record, p. 17), have the right to picket and boycott the stores of the Respondent for the purpose of compelling Respondent to engage and employ colored persons in managerial and sales positions. *It is admitted that they did so picket and boycott* (Record, p. 16).

The Respondent employs a large number of colored persons (Record, p. 2), and enjoys harmonious relations with them. None of such colored employees of the Respondent are connected with the Petitioner Corporation or its activities, and no dispute of any kind exists between the Respondent and such employees. The statement of the Petitioners that they acted as agents for discharged employees of the Respondent is an injection placed herein by counsel for Petitioners and is absolutely unsupported by the record.

The Questions of Law submitted herein by the Petitioners are substantially those fully considered in the Courts below, except for the allegation in Question of Law number three (Petition, p. 5), wherein counsel for Petitioners contend that this is a "labor dispute where the Respondents have

discontinued the services of persons represented by the Petitioners," which allegation is mere fiction assumed as fact by Petitioners' counsel and not substantiated by the record. Consequently, that question not being before this Honorable Court, argument herein will be confined to matters included in the record.

I

Petitioners, Having Admitted the Act of Picketing the Stores of the Respondent, Were Properly Enjoined by the Trial Court

The Petitioners, who conducted the picket and boycott of Respondent's store, were not employees or representatives of employees or discharged employees, and, while their motives may have been good, their actions could but cause racial strife, with resultant violence, as "Violence in racial disputes is, as a matter of common knowledge, highly probable" (Record, p. 35; separate opinion of Mr. Justice Stephens of the United States Court of Appeals for the District of Columbia, dissenting in part, but concurring in the affirmance of the injunction granted herein by the trial court).

The record shows that "Said defendants, their pickets or patrols or some of them have jostled and collided with persons in front of the said store and have physically hindered, obstructed, interfered with, delayed, molested, and harassed persons desiring to enter the place of business of the Plaintiff Corporation; said pickets, or some of them, have attempted to dissuade and prevent persons from entering plaintiff's place of business;" (Record, p. 4).

> "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching" (Jonas Glass Co. v. Glass Bottle Blowers' Asso., 72 N. J. Eq. 653).

And in the case of Pierce v. Stablemen's Union, 165 Cal. 70, it was said at page 79:

> "A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends and is designed by physical intimidation to deter other men from seeking employment in the places vacated by strikers. It tends and is designed to drive business away from the boycotted place, not by legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect, disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

Petitioners have cited in their brief the case of American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184. It will be noted that said case, decided by Mr. Chief Justice Taft, involved a *labor dispute* in which Plaintiff operated "an open shop, did not recognize organized labor and would not deal with the committee," and yet, even in that case, so involving a labor dispute, the Chief Justice said "the name 'picket' indicated a militant purpose inconsistent with peaceable persuasion."

It will be further noted that the observer permitted in the American Steel Foundries case was for the purpose of inducing employees to leave their employment, while in the cause at bar *the picket is directed solely at the ruination of Respondent's business.*

In a well reasoned opinion in Elkind and Sons, Inc., et al., v. Retail Clerks International Protective Association et al., 169 Atl. 494, a New Jersey Chancery decision, decided December 6, 1933, the Court said in part:

> "The defendants sought to hide their real purpose behind the pretense that they were seeking to advance the interests of the employees; but this was a service unsought and unasked for by them. It may have been acquiesced in by some, but it was forced upon most of them. The strike agitators were mere volunteers. They sought mainly to advance their own personal interests by demonstrating to their superiors their usefulness in inciting strikes, and their ability to enforce their demands. They assumed the role of those aptly characterized by Vice-Chancellor Fallon in Bayonne Textile Corp. v. American Federation of Silk Workers et al., 114 N. J. Eq. 307, 168 Atl. 799, 803, as 'intermeddlers' * * *"

The same opinion quotes from the case of Truax v. Corrigan, 257 U. S. 312:

> "We held that under these clauses picketing was unlawful and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms."

The opinion in the Elkind case further states:

> "Picketing is a militant word and the act of picketing is militant in both character and purpose. Its purpose, compulsion or coercion, is accomplished only by intimidation. * * *"
>
> "Picketing in its mildest form is said to be a nuisance. And a private nuisance, regardless of its intimidating character or effect, will be enjoined," citing Jonas Glass Co. v. Glass Bottle Blowers' Asso., *supra.*

The question of picketing was very fully discussed in the case of Beck v. Teamsters' Protective Union, 118 Michigan 520, in which the Court said in part:

> "To picket complainant's premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways and public streets must be free for all

> for the purpose of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done 10 or 1000 feet away.
>
> "It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They intended to intimidate and coerce. * * *"

The proposition is well established that a combination looking towards the domination or ruination of the business of another by fraud, violence or coercion is fundamentally unlawful.

> Waitresses Union, Local No. 249, et al., v. Benish Restaurant Company, Inc., 6 F. (2d) 568.
>
> Kinloch Telephone Company v. Local Union No. 2, 275 Fed. 241.
>
> Quinlivan, et al., v. Dail-Overland Company, et al., 274 Fed. 56.

Petitioners have cited the case of American Federation of Labor v. Buck's Stove and Range Co., 33 App. D. C. 83, and in their very language support the position taken by the Respondent, that injunction lies against interference with business in cases in which there is violence or the *coercion or intimidation of customers.*

Petitioners also cite the case of Julie Baking Co. v. Graymond, 274 N. Y. Sup. 250 (Brief of Petitioners, p. 16). This case was overruled by the same Court, in the same volume of reports and at a later date, when it decided a case identical to the one at bar, namely Beck-Hazard Shoe Corp. v. Johnson, 274 N. Y. Sup. 946, in which an organization of negroes picketed stores of the Beck-Hazard Corporation, bearing signs reading "An Appeal. Why spend your money where you can't work? This is foolish. Stay Out. Citizens League for Fair Play," which signs were similar to the signs carried by the pickets herein, and in that case an

injunction was granted, the Court in its opinion, saying in part:

> "The acts of the defendants are irreparably injuring the plaintiff's business. Not only do they tend to keep prospective colored customers out of the store of the plaintiff, but they must necessarily have the effect of keeping out prospective white customers also. The purpose of the defendants in having members of one race discharged in order to employ the members of another race will not justify this direct damage to the plaintiff in the conduct of its business."

The case of King et al. v. Weiss Company, 266 Fed. 257, is further authority to sustain the decision below. In the King case *white* workers in a plant struck and acts of intimidation which prevented *colored* employees from working were restrained, although such acts would not necessarily have prevented white workers from continuing in employment; the case being one of intimidation, and the timid being entitled to protection against unlawful threats and intimidation, even though the acts would not be sufficient to affect bolder persons.

II

The Court Below Did Not Err in Granting the Injunction Against Picketing and Boycotting

Petitioners rely only on cases involving labor disputes. *No such dispute exists herein* and every instance in which cases have arisen because of picketing by a racial group or organization, it has been held that *such cases did not involve labor disputes and the picketing was enjoined.*

The decree herein granting a permanent injunction (Record, pp. 21, 22) contains no language which requires any of the Petitioners to do business with the Respondent, but only *prohibits them from unlawfully interfering with Respondent's business.*

The Record (pp. 4, 5, 6, 7, 8) discloses numerous averments as to articles appearing in the Washington Tribune (a negro newspaper) relating to threats against the Respondent made in open public meetings held by the Petitioners herein, showing an intention to picket not only one but several of the Respondent's stores, without finding in the Petitioners' answer (Record, pp. 12, 15, 16, 17) any denial of the truth of the facts therein set out, the Petitioners making only the bare statement that "None of the Defendants is connected with or exercises any control over the Washington Tribune or has caused or permitted the Washington Tribune to publish any article or news item whatsoever or in any way acted in concert with the Washington Tribune in said publications" (Record, p 16). The answer of the Petitioners further specifically admits that "the defendant corporation has heretofore and prior to the acts herein complained of, picketed or expressed the intention of picketing two other stores of the plaintiff" (Record, p. 16).

It was and is contended that judicial notice should be taken of the fact that the intersection of Eleventh and U Street, Northwest, where the picketing occurred, is one of the main traffic intersections of the City of Washington, and at many times during the day is very congested and that therefore any picketing of the nature complained of herein may at any time result in violence and disturbance of the peace. It has been affirmatively alleged that interference and intimidation have actually taken place (Record, p. 4).

III

The Court Below Properly Held That the Matter in Controversy Herein Was Not Comprehended by the Labor Disputes Act of March 23, 1932

The relationship of employer and employee must exist, or a dispute must grow out of that relationship before the Labor Disputes Act of March 23, 1932, 47 Stat. 70, has

application, and further, in every decided case similar to the one at bar it has been held that picketing by a racial organization to force on employers the hiring of members of that race, does not involve a labor dispute.

In United Electric Coal Companies v. Rice et al., 80 Fed. (2d) 1, certiorari denied 297 U. S. 714, the Court in determining whether or not the Labor Disputes Act of March 23, 1932, prohibited the issuance of an injunction where the dispute was between two rival labor unions, used the following language in holding that the relationship of employer and employee must exist before the act is applicable:

> "Appellant is the innocent bystander, a victim of this unabated conflict. Appellant has no dispute with its employees. The wage scales in force apparently were satisfactory to employer and employee alike. The working conditions brought no discontent. The employees were desirous of working for appellant. With them the appellant wish to operate its mine. This has been prevented by the struggle between the two unions over who should represent the employees." • • • "Do the facts present a case 'growing out of a labor dispute' or which is 'involved in a labor dispute,' as those two phrases are used in the Act?
>
> "Looking to the purpose, as well as to the words, of the Act, we are satisfied that the term 'labor dispute' should be most broadly and liberally construed. The term 'labor disputes' comprehends disputes growing out of labor relations. It infers employment—implies the existence of the relation of employer and employee. Disputes between these parties are the general subject matter of this legislation. All such disputes seem to be clearly included.
>
> "Equally clear we think must be the conclusion that the dispute referred to in the statute must be one between the employer and the employee or growing directly out of their relationship. It does not apply to disputes between employees or to disputes between employee unions to which the employer is not a party. The employer is not precluded from invoking the jurisdiction of a Federal Court of equity unless it appears

that it was in some way a party to the dispute, between two unions."

There have been but two decisions of Appellate Courts on the identical issue involved in the petition herein, and in both such cases, decisions adverse to the contentions of the Petitioners herein were handed down. The first decided case on the question was that of Green v. Samuelson, 178 Atl. 109, decided April 2, 1935. This case involved the picketing of stores in a colored section of Baltimore, Md., by an organization of negroes, similar to the Petitioner Corporation herein, and the Court of Appeals of Maryland, in deciding the case, said in part.

> "So far as we are able to ascertain, this is the first time the question here presented has arisen in an appellate court, and our information is that the case in the court appealed from is the first time it has been presented to any tribunal. About a month after the bill was filed in the circuit court for Baltimore City a similar bill was filed in New York, Beck Shoe Corporation v. Johnson, 153 Misc. 363, 274 N. Y. S. 946, and both chancellors declined to regard the question as a labor dispute, and, on the ground of public policy, granted the relief prayed by the bills for injunction. They have already excited some attention as will appear from 83 Pa. Law Rev. 381, and 48 Harvard Law Rev. 691."

In the Green case there was "no evidence of physical violence and/or disturbance of the peace," and the answer filed in that case set out:

> "And denying that they 'Coerced, intimidated or forced' storekeepers in the immediate neighborhood of the plaintiffs to 'discharge white employees and to hire in their stead negro employees.'"

which is substantially the same answer made by the Petitioners herein (Record, p. 15). The Maryland Court, however, held:

"The defendants contend that this case is, or is akin to, a labor dispute, because their purpose is to secure employment for members of their race and thus improve its condition and that it has such a justifiable cause as to warrant their actions in enforcing their demands by the methods commonly called 'picketing.' International Pocketbook Workers v. Orlove, 158 Md. 496, 148 A. 826. They disclaim any intention or purpose of depriving the plaintiffs' employees of their positions or livelihood, yet, if successful, their activities could have no other result. It is not denied that there is no quarrel or dispute between employers and employees and none between the defendants and those employees. Their grievance is that the defendant merchants depend almost wholly on colored patronage for their existence and that these merchants do nothing for them in return. That there is some merit in their complaint cannot be disputed, as the planting of a white store in an exclusively colored community is an exploitation of the inhabitants for profit, but the defendants cannot right their wrongs by means that are unlawful. The defendants and others of their race have a perfect right to buy where they please. Nor is there anything 'unlawful in the action of a combination who by concerted action cease to patronize a person against whom a concert of action is directed when they consider it is to their interest to do so.' 12 C. J.; Code, Art. 27, 43. * * *

"(3) The defendants do not contend that this is a labor dispute as commonly recognized, but, to justify their actions in instituting a boycott carried on by picketing, they invoke the rules applied to such disputes. There is no question here involved of hours, wages, working conditions, or the right to organize. Whatever of organization there is is made up of colored men and women of various professions, occupations, and callings, to promote the interests of the colored race generally by obtaining employment for its people. The general purpose of colored persons to improve their race may not be improper, but they must adopt lawful means to accomplish this end, and must not resort to intimidation and threats which may easily lead to breach of the peace and physical violence. As

said in My Maryland Lodge v. Adt, 100 Md. 238, 249, 59 A. 721, 723, 68 L. R. A. 752: 'They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with not attempt at coercion. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy. But the law does not permit either employer or employee to use force, violence, threats of force or threats of violence, intimidation, or coercion.'

"They may, by organization, public meetings, propaganda, and by personal solicitation, persuade white employers to engage colored employees and to induce their people to confine their trade to those who accede to their wishes, and whether they succeed or fail will depend on the co-operation of their people.

"(4, 5) The complaint here is not with the thing intended to be done, but with the means employed to do it. The case immediately before us is the effort of a race to improve its condition in a section of a large city inhabited almost exclusively by one race, and no way has been pointed out to us, and we know of none, whereby the courts can make a rule to apply to the conditions there existing which would not be applicable where the same racial conditions do not exist. If we say what was being done in the seventeen hundred block on Pennsylvania Avenue in Baltimore was proper, then it can be done in any other block in the city; there cannot be one law for Pennsylvania Avenue and another for streets where the white races predominate and trade, and the courts, in laying down a rule of conduct, must not only consider what has been done but what may be done in consequence of it.

"*In our opinion, this is a racial or social question, and as such, the rules heretofore announced and applied to labor disputes have no application, and the things complained of were properly enjoined* • • •" (italics ours).

And in the case of Beck-Hazard Shoe Corp. v. Johnson, *supra*, the Court further said:

> *"The controversy here is not a labor dispute. The Defendants do not constitute a labor union or a labor organization of any kind. They do not compose, nor are they all members, of any single trade or class of trades. Their demands are not connected with any one industry."*
>
> *"The questions about which they are now picketing have no connection with wages, hours of labor, unionization, or betterment of working conditions.*
>
> *"It is solely a racial dispute* (italics ours). It is born of an understandable desire on the part of some of the negroes in this community that the stores in their neighborhood where they spend their money should employ a percentage of negro help. Their exclusive concern is that a certain number of white persons be discharge in order to make place for members of their own race.
>
> "The papers on this motion indicated that there is no unanimity of opinion among the negro leaders themselves as to the wisdom of this course of conduct. Editorial comment from a popular and prominent newspaper published in this community by negroes and read by negroes principally has been submitted to the Court, indicating opposition to the activities of the defendants. The Citizens League for Fair Play is apparently now also out of sympathy with them.
>
> "The Court must take into consideration the ends to be accomplished and the means here adopted by these defendants. *Assuming that the means were peaceful and were devoid of misrepresentation, disorder, or violence, the Court is still of the opinion that the purpose sought does not justify the means used, and that injunctive relief is warranted"* (italics ours).

The attention of this Honorable Court is respectfully invited to the following excerpt from the opinion of the Court of Appeals in determining this case (Record, p. 32):

> "However commendable the purposes of the appellants may be in attempting to improve the condition

of their race, they are not, in carrying out such purposes, justified in ignoring the rights of the public and the property rights of the owner of the business which they attempt to boycott. To sustain such action on the part of an organization established merely to advance the social standing of its race would be in complete disregard of fundamental principles of public policy, and cannot be supported upon any principle of law, equity of justice."

Conclusion

Counsel for Respondent respectfully submit that, as the Petitioner Corporation does not constitute a labor union or a labor organization of any kind, and there is no question here involved regarding wages, hours of labor, unionization, or betterment of working conditions, there is no labor dispute involved herein; that the courts below properly enjoined the Petitioners, who were all actively engaged in the matters complained of, from picketing and boycotting the stores of the Respondent; and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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